89-1323

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989 —

BERNIE E. ZETTL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, in a case involving the dissemination of a copy of a classified budget document, the government may obtain a conviction under 18 U.S.C. § 641 solely by showing that the conveyance of the copy was unauthorized, without proving that the conveyance substantially interfered with the government's control over the information in the document.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Bernie E. Zettl respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Fourth Circuit entered in this case on October 23, 1989.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 889 F.2d 51 and is reproduced in the Appendix at 1a.

JURISDICTION

The judgment of the Fourth Circuit was entered on October 23, 1989. The Fourth Circuit denied a petition for rehearing and rehearing en banc on January 16, 1990. (24a). Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case requires the interpretation of 18 U.S.C. § 641, which is set forth in full in the Appendix at 26a.

STATEMENT OF THE CASE

This case concerns the power of the government to criminalize the dissemination of copies of government documents.

In September, 1985, the government unsealed indictments against petitioner, a retired Air Force major employed as a consultant to various companies in the defense industry, and two employees of GTE for allegedly conspiring to obtain and convert information contained in various classified budgetary documents generated by the Department of Defense ("DoD"). Though Mr. Zettl and the GTE employees possessed appropriate security clearances, and though no transmission of the documents to uncleared individuals was alleged, the indictment also included two espionage counts. The indictment further included charges under 18 U.S.C. § 641 that the defendants converted, conveyed, or received without authorization a copy of a particular budget document, the 1984 Navy Program Element Descriptive Summaries ("PEDs"). The PEDs is a compilation of summaries of various Navy programs which is submitted to Congress as part of the yearly budget process. The document is classified SECRET, but the government made individual summaries, if not the entire document, available for inspection and copying at DoD technical libraries by those representatives of the defense industry, including GTE, possessing an appropriate clearance and "need to know."

Pursuant to the requirements of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV, defendants announced their intent to introduce classified documents at trial. The defense argued that the documents, most of which GTE obtained through authorized

channels to further its performance of DoD research and development contracts, contained information the same as, or similar to, that found in the 1984 PEDs. The defense asserted that this overlap proved that the information in the PEDs was not closely held, that GTE possessed a "need to know" the information in it, thereby authorizing its possession of the PEDs under the Industrial Security Manual ("ISM"), and that the conveyance of the PEDs could not have interfered with the government's right to control the information in the document or with its competitive bidding process.

The district court held a series of hearings on the relevance of the documents sought to be introduced at trial, and held that approximately 200 classified documents were admissible. The district court further ruled that the statement substitutions proposed by the government under § 8 of CIPA were inadequate. The government then took its first interlocutory appeal, forcing a postponement of the trial.

On the first appeal, the government contended that the documents at issue were irrelevant and that the district court improperly failed to consider evidentiary privileges enjoyed by the government when weighing the relevance of the documents. The Fourth Circuit, in an opinion reported at 835 F.2d 1059 and appended at 7a, affirmed the relevancy determinations, but was reluctant to penalize the government for its failure to assert privilege at the appropriate stage, though it recognized that the government's position was inconsistent with that advanced at the trial level. (21a). The Fourth Circuit accordingly remanded with instructions to permit the government to assert applicable privileges, and clarified the procedures to be followed under CIPA. (22a-23a).

On remand, the government dismissed four of the five counts of the indictment and two of the three defendants. This dismissal left Count II, which alleged that

Mr. Zettl converted and conveyed without authority to GTE a copy of the 1984 PEDs.

In the wake of the government's reduction of the indictment, the district court received further argument regarding its previous relevancy determinations under CIPA.[1] The court nevertheless affirmed its earlier rulings, as it held that the classified documents were germane to the issues of whether the 1984 PEDs was closely held, whether GTE had a "need to know" the information in the PEDs, whether the PEDs had a value in excess of $100, as required to sustain a felony conviction under § 641, and whether the distribution of the copy of the PEDs represented an interference with the government's property rights to the information in the document. The district court further rejected eight of the statement substitutions proposed by the government, and denied the government leave to file redactions after the deadline imposed by the court.

The government filed a second interlocutory appeal. The Fourth Circuit reversed. The court found that the government's decision to abandon claims that Mr. Zettl converted the 1984 PEDs, in favor of relying on the theory that he conveyed without authority the copy of the document, rendered the classified documents sought to be introduced at trial irrelevant. The court held that the conveyance without authority prong of § 641 does not require proof by the government that the conveyance interfered with the exercise of its property rights, as the language was distinct from the conversion prong of the statute. The court also summarily held that the issues of "need to know" and whether the information was closely held were immaterial to the case.

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[1] Though the government had appealed the initial rulings of the district court for the purpose of preserving its right to invoke the state secrets and informer privileges, the government did not assert either privilege on remand.

The Fourth Circuit stayed its mandate to permit the filing of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. INTERFERENCE WITH THE GOVERNMENT'S USE OF PROPERTY IS A NECESSARY ELEMENT OF § 641

Title 18 U.S.C. § 641 provides, in pertinent part, that "whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, *or* without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ." (emphasis added).

The Fourth Circuit, focusing on the underscored "or," held that the above sentence in § 641 "prohibits two separate acts. The first is to embezzle, steal, or knowingly convert United States property and the second is to sell, convey, or dispose of United States property without authority." (4a). The court, citing *United States v. Scott*, 789 F.2d 795 (9th Cir. 1986), concluded that given this separation, the government need not prove the elements of conversion in order to secure a conviction for an unauthorized conveyance of property.

The effect of the Fourth Circuit's ruling is that the government may obtain a conviction for an unauthorized conveyance of U.S. property without any showing that the conveyance interfered with the government's property rights. All the government need prove is that its property, be it tangible or intangible, was conveyed without authority. This holding, justified on principles of statutory interpretation, ignores the history of § 641 and its narrow intent to criminalize the theft or conversion of U.S. property. Moreover, this interpretation is in conflict with decisions from two other Circuits, which have held that conversion is a necessary element of § 641. The Fourth Circuit's refusal to impose a requirement on the

government of proving that a conveyance of U.S. property interfered with the government's use of the property may also result, when coupled with an expansive view of what constitutes property, in § 641 being used to reach acts governed by other, more specific statutes in Title 18, or in the prosecution of a wide range of activities previously not viewed as criminal.

A. Congress Did Not Intend Unauthorized Conveyance to Represent a Separate Crime Under § 641

The Fourth Circuit's ruling, predicated on the belief that Congress's use of the disjunctive in § 641 demonstrated a conscious intent to create separate crimes with separate elements, ignores the history of the statute and its interpretation by this Court. Section 641 was enacted in 1948 "as a consolidation of four former sections of Title 18, as adopted in 1940." *Morissette v. United States*, 342 U.S. 246, 265 (1952). This Court could find no purpose to the enactment other than "to collect from scattered sources crimes so kindred as to belong in one category." *Id.* at 266-267. Moreover, the Court specifically noted that the statute "was not intended to create new crimes but to recodify those then in existence." *Id.* at 269, n.28. The legislative history thus reveals not an intent to designate separate crimes, but merely an effort to distill the language of four independently enacted criminal provisions into the framework of a single statute.

The Court's analysis of § 641 in *Morissette* also repudiates a related assertion by the Fourth Circuit—that requiring proof of conversion (in the sense of demonstrating interference with the government's use of the property) as an element of unauthorized conveyance is impermissible, for it would render the conveyance without authority clause in the statute superfluous. The Court in *Morissette* specifically rejected a similar argument made by the government that construing "the statute to

require a mental element as part of criminal conversion" renders conversion "a meaningless duplication of the offense of stealing, and that conversion can be given meaning only by interpreting it to disregard intention." *Id.* at 271. The Court acknowledged that the various prohibitions contained in the statute overlapped considerably, yet it viewed this as an acceptable result of the desire of the statute's drafters to ensure that all wrongful uses of United States property were reached by the statute. *Id.* The unauthorized conveyance language of § 641, while perhaps duplicative of the clause prohibiting the conversion of property of the United States, undoubtedly also reflects the effort to avoid "the fine distinctions between slightly different circumstances under which one may obtain wrongful advantage from another's property." *Id.* Accordingly, no support exists for the Fourth Circuit's conclusion that conversion by necessity must be a distinct crime from unauthorized conveyance.

B. The Fourth Circuit's Opinion Conflicts With Those of Other Courts

Even if one accepts that the crime of unauthorized conveyance need not, under principles of statutory construction, contain elements independent of conversion, the issue remains whether the former should require proof of interference with the government's right to use of the property. Two courts have answered in the affirmative. In *United States v. Thordarson*, 646 F.2d 1323, 1335, n.25 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981), the court viewed *Morissette* and the history of § 641 as requiring some proof of conversion:

> Although *Morissette* does not explicitly state that conversion is an element of § 641, that is the effect of *Morissette*'s reasoning . . . It is thus clear from *Morissette* that any violation of § 641 must involve a conversion.

In *United States v. May*, 625 F.2d 186 (8th Cir. 1980), the court reversed a conviction under § 641 because the

jury instructions failed to require a finding that the defendant's alleged misuse of a government aircraft constituted a "serious violation of the owner's right to control the use of the property." *Id.* at 192. The court, noting that the "touchstone of conversion is the exercise of such control over property that serious interference with the rights of the owner result[s]," criticized the district court's instruction because "it assume[d] that any misuse or unauthorized use of property is a conversion." *Id.*

The Fourth Circuit's ruling is in disagreement with the above decisions. Indeed, the Fourth Circuit opinion specifically criticizes the *Thordarson* case for incorrectly construing *Morissette*. (3a). As discussed above, however, the basis for this criticism rests on an incorrect analysis of the history and purpose of § 641. Given the existence of this interpretational conflict, resolution of the issue by this Court is warranted.

C. The Court Should Consider Whether § 641 Should Be Used to Prosecute the Dissemination of Government Information if Interference With the Government's Control of the Information Is Not Shown

Aside from resolving the conflict in the lower courts, certiorari also would be appropriate to consider whether the use of § 641 to criminalize the dissemination of information in which the government claims a property interest is consistent with the purpose of § 641, if the government cannot prove that the dissemination interferes with its control over the information.

1. *The Application of § 641 to the Theft or Conversion of Intangible Property has Divided the Lower Courts*

The issue of whether § 641 even applies to the theft or conversion of intangible property is itself one that has divided the lower courts. Several courts have held that § 641 does not criminalize the theft of intangible prop-

erty. *United States v. Chappell*, 270 F.2d 274 (9th Cir. 1959); *accord United States v. Tobias*, 836 F.2d 449, 451 (9th Cir.), *cert. denied*, 108 S.Ct. 1299 (1988); *United States v. Hubbard*, 474 F. Supp. 64, 79-80 (D.D.C. 1979). The Ninth Circuit decisions were based on an extensive review of the legislative history to § 641, which demonstrated that the predecessors to the statute penalized exclusively the theft or conversion of tangible property. *See Chappell*, 270 F.2d at 276-78. This conclusion was buttressed by the desire to avoid the first amendment problems inherent in applying the statute to intangibles such as classified information. *See Tobias*, 836 F.2d at 451. Similar logic motivated the court in *Hubbard* to decline to apply § 641 to the theft of government information through unauthorized copying of government documents. 474 F. Supp. at 79-80.[2]

By contrast, other courts have permitted convictions under § 641 for the theft or conversion of intangible United States property. Yet, the courts in those cases either explicitly recognized that the theft or conversion in the case represented a serious interference with the government's use of the property or the interference was obvious from the record. For example, in *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986), a divided court upheld a conviction under § 641 for the sale of grand jury minutes to targets of the grand jury's investigation. The court noted that the defendant was "undoubtedly guilty of selling something that the government rightfully desired to keep in

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[2] The court in *Hubbard*, relying on *United States v. DiGilio*, 538 F.2d 972 (3rd Cir. 1976), *cert. denied sub nom. Lupo v. United States*, 429 U.S. 1038 (1977), did permit the government to proceed to trial on the theory that the use of government resources to copy the document at issue could represent a violation of § 641. In this case, however, the government has represented in its response to the defense's motion for a bill of particulars that the thing of value is the information in the 1984 PEDs. Moreover, the government has never alleged that its resources were used to copy the PEDs.

its exclusive possession." *Id.* at 682. Such a declaration was not necessary in *United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), in which the court affirmed the § 641 conviction of a Drug Enforcement Agency employee who sold information from DEA computer files to a person purporting to be a drug dealer. Since the information sold concerned the names of DEA informants, and came from confidential files, any disclosure of the information could be presumed to interfere materially with the government's use of the information.[3] *See also United States v. Jones*, 677 F. Supp. 238, 240-41 (S.D.N.Y. 1988) (defendant indicted under § 641 for selling information regarding a government criminal investigation; motion to dismiss denied because facts indicated that the government kept the information out of the public domain).

2. *Use of § 641 to Criminalize Disclosures of Information is Suspect in View of the Difficulty in Determining Whether the Disclosure was Unauthorized*

Without the limitation of a requirement of proving that an unauthorized disclosure of government information interfered with the government's use of the information, § 641 could become a tool of prosecutorial abuse. By simply showing that a release of information was unauthorized, the government could prosecute whistleblowers, employees who leak details of particular government programs, or those who divulge information in a manner deemed contrary to a government policy. The confusion over what acts would constitute a violation of the statute, and the attendant constriction of the exchange of information between government officials and

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[3] No such presumption is appropriate in this case when the document at issue, the 1984 PEDs, was distributed widely within the Executive Branch, presented to Congress, and made available to cleared representatives of the defense industry at DoD technical libraries.

the defense industry and possible chilling of first amendment rights, would be even more pronounced because the statute does not define the term "without authority." Indeed, at least one judge has recognized that the vagueness inherent in the term brings into question the constitutional validity of the statute. *United States v. Truong Dinh Hung*, 629 F.2d 908, 924-26 (4th Cir. 1980) (Winter, J., concurring); *cf. United States v. Girard*, 601 F.2d at 71 (agency rules and regulations delineate scope of authority for purposes of § 641).

Difficulties in defining "without authority" are present in this case. No particular portion of the ISM, which regulates the storage, handling, and dissemination of classified information, proscribed the conveyance of the classified information in the PEDs by Mr. Zettl to GTE.[4] Under the ISM, petitioner was characterized as a Type A Consultant. The only restriction imposed by the ISM on Type A Consultants regarding their dissemination of classified information was that they "not disclose classified information to unauthorized persons." ISM, ¶ 68.a (2). The regulation governing Type A Consultants did not automatically require approval by a government official of dissemination of classified information.[5] More-

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[4] In addition, though the government urges that the ISM defined the relevant authority to disclose classified information, no notice was given in the ISM for 1983 that a breach of its provisions could result in a criminal prosecution under § 641. In 1983, all recipients of classified information were required to acknowledge familiarity with the criminal statutes set forth in Appendix VI to the ISM. Appendix VI specifically identified which statutes criminalized ISM violations. Section 641 was not one of those statutes. Indeed, only after the indictment in this case was returned and an issue raised regarding this omission was Appendix VI amended to identify § 641 as a statute under which unauthorized disclosures of classified information could be prosecuted.

[5] One regulation governing defense contractors did require the approval of a contracting officer before classified information at the SECRET level could be disseminated to third parties. ISM, ¶ 5.x.

over, the ISM defined "unauthorized persons" as those "not authorized to have access to specific classified information in accordance with the provisions of this manual." ISM, ¶ 1.cp. Conversely, the ISM defined "authorized persons" as follows:

> Those *persons who have a need-to-know* for the classified information involved, and have been cleared for the receipt of such information (see paragraph 3bg). *Responsibility for determining* whether a person's duties requires that he possess, or have access to, any classified information and whether he/she is *authorized to receive it, rests upon the individual who has possession, knowledge, or control of the information involved*, and not upon the prospective recipient.

(Emphasis added). Petitioner accordingly sought to introduce classified documents at trial to demonstrate that GTE possessed a "need to know" the information in the PEDs, thereby conferring on him authority to disseminate the PEDs to GTE.[6] Though petitioner's position found support in two other cases,[7] it was rejected summarily by the Fourth Circuit. (4a). In addition, the court has limited extrinsic evidence regarding the issue of authority by refusing to permit petitioner to introduce

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The applicability of this regulation to petitioner is in dispute. Moreover, even assuming that the regulation governed the activities of Type A Consultants, subparagraph (2) provided an exception to the approval requirement if release of the information was "necessary in the performance of the contract." In light of GTE's extensive contractual relationship with the DoD, Mr. Zettl was excepted from any need to obtain approval from a contracting officer to divulge classified information to GTE.

[6] As noted above, both Mr. Zettl and GTE representatives possessed security clearances.

[7] *See United States v. Truong Dinh Hung*, 629 F.2d at 919, n.10 (clearance plus need to know complete defense to charges under 18 U.S.C. § 793); *accord United States v. Morison*, 604 F. Supp. 655, 662 (D. Md. 1985).

proof of the custom and practice in the defense community of widespread dissemination of government budget documents.

3. *Prosecution of Disclosures of Classified Information Under § 641 Disrupts the Operation of Statutes Already Governing the Handling of Classified Information*

Even assuming that the conveyance of classified information in the PEDs was not authorized, and that notice of a lack of authority was evident enough to justify the imposition of criminal sanctions, the Court should review whether the conveyance could be prosecuted under § 641 when the act was not prohibited by the set of statutes which specifically govern the handling of classified information. In his concurrence in *United States v. Truong Dinh Hung*, Judge Winter discussed at length the congressional establishment of an elaborate mechanism for punishing specified disclosures of classified information by specified individuals. Judge Winter expressed his concern that "if § 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions." 629 F.2d at 926. Judge Winter feared that § 641 would sweep aside limitations placed by Congress on criminal prosecutions of disclosures of classified information, and that the existing statutes would be subsumed within the broad sweep of § 641. *Id.* at 927. He also pointed out that expansion of § 641 to cover classified information would be inconsistent with the conscious decision of Congress to refrain from criminalizing the mere unauthorized disclosure of classified information. *Id.* at 928; *see also United States v. Tobias*, 836 F.2d at 451 (refusing, albeit for different reasons, to apply § 641 to theft or conversion of classified information); *United States v. Jeter*, 775 F.2d at 683-686 (Merritt, J., dissenting) (the contempt statutes, not § 641, should be used to punish improper disclosure of grand

jury matters). The overextension of § 641 becomes even more acute when a prosecution can be maintained for an unauthorized disclosure of classified information though proof is absent that the disclosure interfered with the government's control over the information. The Court should consider whether this application of § 641, as sanctioned by the Fourth Circuit's decision, is in conformity with congressional intent and the purposes of the criminal laws governing classified information.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: February 20, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 88-5577

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BERNIE E. ZETTL,
Defendant-Appellee.

Argued March 9, 1989

Decided Oct. 23, 1989

Michael Crockett Olmstead, Theodore Stewart Greenberg (Peter B. Clark, Washington, D.C., Harriet Halper, Henry E. Hudson, U.S. Atty., U.S. Dept. of Justice, Alexandria, Va., on brief) for plaintiff-appellant.

Richard Anthony Hibey (Gordon A. Coffee, Anderson, Hibey, Nauheim & Blair, Washington, D.C., on brief) for defendant-appellee.

Before ERVIN, Chief Judge, and WIDENER and PHILLIPS, Circuit Judges.

WIDENER, Circuit Judge:

The United States appeals from a pretrial order authorizing the disclosure of classified information. 18 U.S.C.App. IV § 7(a) authorizes this interlocutory appeal. The district court held that conversion was a necessary element of a violation of 18 U.S.C. § 641 which it decided made several documents it had mentioned with

particularity relevant to the defendant's case; that six of the government's statement substitutions pursuant to the Classified Information Procedures Act (CIPA) were inadequate; and that the government could not have additional time to correct the substitutions. The government argues that the classified documents are not relevant because the element of conversion is not a necessary part of the unauthorized conveyance portion of § 641; that the proposed substitutions satisfy the requirements of CIPA; and that the district court abused its discretion in not granting additional time. We are of the opinion that the documents in question are not relevant to Zettl's defense, and we vacate the order appealed from and remand for further proceedings.[1]

On September 10, 1985, Bernie E. Zettl, Walter R. Edgington, and Robert E. Carter were charged with violating 18 U.S.C. § 371, 18 U.S.C. § 641 and 18 U.S.C. § 793. Zettl and Edgington were also charged with conversion and espionage. After the first round of CIPA hearings was held, the district court found that many of the classified documents were relevant and rejected the government's substitutions. See *United States v. Zettl*, 835 F.2d 1059, 1062-63 (4th Cir.1987) (*Zettl I*). The government appealed and we affirmed the district court's relevancy findings but remanded for the district court to consider any claim of privilege of state secret or informer that the government might want to assert. *Zettl I*, 835 F.2d at 1065-66. Following remand and upon the government's motion, the district court dismissed counts 1, 3, 4, and 5 of the indictment, leaving only the § 641 violation against Zettl regarding the Navy's 1984 Program Element Descriptions (PEDs). In addition, the government has stated that it will proceed against Zettl

[1] Since we reverse the district court's relevancy findings we do not reach the issues as to the validity of the government's offered substitutions or the propriety of the district court's ruling not allowing the government additional time.

only upon the portion of § 641 that prohibits conveying government property without authority.[2]

After the post-remand CIPA hearings, the district court decided that the requirement of § 641 that the defendant "without authority . . . convey[]" still required proof of "substantial interference with the government's ownership rights" since "any violations of 641 must involve a conversion." The district court ruled that the documents it had mentioned were relevant as to conversion. As an alternative ruling, the district court found the documents relevant to the issues of "need to know," "closely held," "intent," "value," and "substantial interference" with the government's ownership rights. The government appeals, arguing that the proof of conversion is not necessary to convict under § 641.

We first address the district court's relevancy determination. The district court found that the classified documents at issue were relevant because it believed that any charge under § 641 must involve a conversion and that the documents were relevant to elements of conversion. The district court relied on dictum in *United States v. Thordarson*, 646 F.2d 1323, 1335 n. 23 (9th Cir.), *cert. denied*, 454 U.S. 1055, 102 S.Ct. 601, 70 L.Ed.2d 591 (1981). The court in *Thordarson* believed that *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951), taught that any violation of § 641 must involve a conversion. We think *Thordarson* does not correctly construe *Morissette*. *Morissette* held that on indictment under § 641 for "steal[ing] and convert-

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[2] Zettl argues that our ruling in *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987), regarding relevancy is the law of the case. The case before us in *Zettl I* involved several defendants and a multi-count indictment for conspiracy, conversion, and espionage. Now that the case has been reduced to one portion of § 641 with one defendant and one series of documents, the prior relevancy determinations are not controlling, for the issues to be tried are simply not the same.

[ing]" property of the United States, the question of intent must be submitted to the jury. It does not, however, even by implication, require the elements of conversion to be proven in each § 641 violation. The relevant portion of § 641 ascribes punishment to whoever "embezzles, steals, purloins, or knowingly converts . . . *or* without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States" (emphasis added). Section 641 prohibits two separate acts. The first is to embezzle, steal, or knowingly convert United States property and the second is to sell, convey, or dispose of United States property without authority. *United States v. Scott*, 789 F.2d 795, 798 (9th Cir.1986); *United States v. Jeter*, 775 F.2d 670, 681 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142, 106 S.Ct. 1796, 90 L.Ed.2d 341 (1986); *Hawkins v. United States*, 458 F.2d 1153, 1155 (5th Cir.1972). One need not prove the elements of conversion to convict under the clause of § 641 which prosecutes one who "without authority sells, conveys or disposes" of property of the United States. "To write the elements of conversion into the crime of unauthorized sale would be to assume that Congress meant nothing at all by making them separate crimes, an assumption we refuse to make." *United States v. Scott*, 789 F.2d 795, 798 (9th Cir.1986).

We next consider the district court's alternative findings to support its relevancy decision. As an alternative finding the district court found the documents relevant to the issues of "need to know," "closely held," "intent," "value," and " 'substantial interference' with the government's property rights." We are reminded first that all counts have been dismissed except the count charging Zettl with an unauthorized sale, conveyance, or disposal of United States property. Especially with the conversion issue removed from the case, there simply is no issue of "need to know" or "closely held" or " 'substantial interference' with the government's property rights."

Since these issues are no longer in the case, the district court's holding that the documents in question are relevant to their proof is erroneous. The reason for this part of our decision is apparent. The government is responsible for the accountability of classified information. It is responsible for the classification thereof and for the dissemination of such information. The government has set up certain procedures and precautions to protect classified documents. Even those with authority to see and handle the documents have no right without authority to convey the documents to others, whether or not the other party may have a need to know the information therein. Any other holding would make the possessor of any classified document the ultimate authority in deciding whether or not the document should be transferred to someone else. This, however, is a function of the government and its system of accountability for classified documents, not of someone who just happens to be in possession thereof, whether or not he rightfully possesses the document.

With respect to the issue of "intent," the documents themselves are likewise without relevance. *Morissette*, *supra*, as noted, held that intent is required to convict on an indictment for conversion under § 641. And for our purposes, we will assume the same is required for this indictment for conveyance without authority. Any requisite intent, however, ". . . is intent to sell [or convey or dispose of] without authorization, and nothing more." *Scott*, *supra*, at 798.

Finally, we address the "value" issue. Section 641 imposes a fine of no more that $10,000, or ten years' imprisonment, or both if the value of the property involved exceeds $100. If the property is worth $100 or less, it imposes a fine of no more than $1,000, or one year, or both. Section 641 defines value as the "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." Zettl argues that he should

be able to introduce the classified documents to prove that they were widely available to defense contractors and therefore the thieves' market value was low. The government plans to prove the value exceeds $100 by the "cost price" of photocopying, transportation, and the other actual costs of the documents Zettl allegedly conveyed without authority. Given the government's method of proving value, the classified documents are not relevant. Even if Zettl could prove the PED was worthless on the thieves' market, if the government proved a greater value through cost price, the greater value controls under the statute.

We have referred throughout the opinion, from time to time, to "the documents" or have used words of like import. By use of those words in that style is meant the content of the documents involved so that when we have said, for example, that the documents are irrelevant, we mean, of course, that the content of the documents is irrelevant. Our understanding of this case is that the Navy PEDs is, in fact, a book of supporting data for the 1984 Navy Defense Appropriation. It is classified SECRET. It is charged that Zettl, having obtained one of these books, sold or conveyed or disposed of it without authority to someone else. The fact that the book is classified SECRET is, of course, relevant to the proceeding, as would be the fact that a given number of papers in the book might individually also be classified as SECRET. But neither the content of the book, nor any of the individual papers therein, is relevant. Zettl is charged with the unauthorized conveyance of classified documents. While the fact that the documents are classified is relevant, their content is irrelevant. The order of the district court appealed from is vacated and the case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-5525

UNITED STATES OF AMERICA,
Appellant,

v.

BERNIE E. ZETTL, ROBERT R. CARTER,
and WALTER R. EDGINGTON,
Appellees.

Argued Nov. 11, 1986

Decided Dec. 17, 1987

John F. De Pue, Dept. of Justice (William F. Pendergast; Carlin D. Stanley, Dept. of Justice; David H. Hopkins, Asst. U.S. Atty., Henry E. Hudson, U.S. Atty., on brief), for appellant.

Barry S. Simon (Brendan V. Sullivan, Jr., Paul Mogin, Jeffrey B. Kindler, Williams & Connolly, Richard A. Hibey, Anderson, Hibey, Nauheim & Blair, Marvin J. Garbis, Ronald B. Rubin, Melnicove, Kaufman, Weiner, Smouse & Garbis, on brief), for appellees.

Before WIDENER, PHILLIPS, and ERVIN, Circuit Judges.

WIDENER, Circuit Judge:

The United States appeals a pretrial order by the United States District Court for the Eastern District of Virginia authorizing the defendants Zettl, Edgington and Carter to disclose certain classified information during

their criminal trial for conspiracy, conversion and espionage. The government is authorized under 18 U.S.C. App. IV § 7 to take this interlocutory appeal from the adverse ruling by the district court. We affirm the order of the district court with respect to relevancy and remand for further proceedings under the Classified Information Procedures Act, 18 U.S.C. App. IV § 1, et seq, (CIPA) and *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985).

The defendants Bernie E. Zettl, Robert R. Carter and Walter R. Edgington were indicted in a multi-count indictment for conspiracy, conversion and espionage. Zettl is a paid consultant for GTE Government Systems Corporation. Carter is a former marketing manager for GTE's Western Division at Mountain View, California, and Edgington is GTE's Vice President for marketing in Rosslyn, Virginia. All three were indicted of conspiracy to convert classified Department of Defense (DoD) documents, particularly the 1984 Navy Program Element Descriptions (PEDs)[1] to their own use and to defraud the United States of the right to have its procurement process free from unauthorized conversion, in violation of 18 U.S.C. § 371. Zettl was charged with converting to his own use and the use of another without authority a United States document, the 1984 Navy PEDs, in violation of 18 U.S.C. § 641. Edgington was charged with receiving, concealing and retaining the 1984 Navy PEDs with the intent to convert them to his own use and gain, in violation of 18 U.S.C. §§ 641 and 2. Zettl and Edgington were also charged with violations of the Espionage Act, 18 U.S.C. § 793(e), as the result of Zettl's delivering the 1984 Navy PEDs to a person not authorized to receive them and Edgington's unauthorized acceptance and

[1] Other documents listed in the indictment include the Program Objective Memoranda (POMs) and the Five Year Defense Plan (FYDP). The 1984 Navy PEDs make up a 1220 page book. The government's brief tells us that the POMs and FYDPs are never released outside the Department of Defense.

retention of that document.[2] Pursuant to § 10 of CIPA, 18 U.S.C. App. IV § 10,[3] the United States advised the defendants that it would rely upon seven program elements contained in the 1984 Navy PEDs to establish the national defense or classified information element of the espionage charge.[4]

It is the government's theory of prosecution that between 1978 and 1983 Carter and Edgington contracted on GTE's behalf with Zettl for the unauthorized procurement of proprietary and classified Department of Defense (DoD) documents.[5] Zettl would transmit the documents to GTE by secretive and unauthorized means. The documents were primarily budgetary information that would then be disseminated to some employees within GTE to be used in preparing bids and contracts to be submitted to the government. Through possession of these documents, GTE had access to DoD information about the kinds of electronic technology the government would be seeking through government contracts and the amount

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[2] Edgington did not receive the PEDs directly from Zettl.

[3] 18 U.S.C.App. IV § 10 provides:

> In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

[4] Those program elements are:

24573N Navy Cover and Deception Program
24575N Electronic Warfare Support
31327N Technical Recons and Surveillance (not all)
63506N Surface Ship Torpedo Defense
63528N Non-acoustic Anti-Submarine Warfare (not all)
64761N Intelligence (engineering)
64675N MK-48

[5] During this time, GTE was a contractor for the DoD for the production of electronic equipment.

of money DoD would seek from Congress to carry on these various projects. GTE would thus have a competitive advantage in the bidding process for these defense department contracts because of its access to internal government budgetary figures.

Among the documents Zettl provided to GTE were the 1984 Navy PEDs, the final supporting document for the budget proposal submitted to Congress. The PEDs had been classified SECRET by the government, and the government claims that only portions of the book were available through proper procedures to those in the defense community possessing the appropriate government security clearance upon demonstration of a need to know the information.[6] It is the government's theory that Edgington [7] did not seek to obtain portions of the PEDs through proper government channels but instead received the entire 1984 PEDs through unauthorized means from Zettl. While all the defendants had the appropriate government security clearance,[8] none had the need to know [9] the contents of the entire PEDs.

The defense counters that all of the classified information upon which the indictment was based was readily

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[6] Individual program elements from the PEDs were available at the Navy Acquisition Research and Development Information Center (NARD-IC) or at the Defense Technical Information Center (DTIC).

[7] Carter was no longer with GTE at that time.

[8] At the time in question, Zettl possessed a SECRET security clearance, and Carter and Edgington possessed TOP SECRET clearances.

[9] The need to know is defined in the *Industrial Security Manual for Safe-Guarding Classified Information* (ISM) published by the DoD in 1985, para. 1.3bg, as "a determination made by the possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to . . ., knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program approved by a UA." (user agency)

available to cleared individuals at GTE through the appropriate government channels. The government has taken no steps to withhold this classified information from cleared persons in the defense community. The defendants already had the classified information plus much more specific information on the same subjects because GTE was actively involved in research and development in many of the programs described in the classified information set out in the indictment. GTE is a manufacturer of electronic warfare equipment and, through that role, it receives a great deal of classified information concerning the Navy's tactical warfare plans. Because the defendants were entitled to receive this classified information through formal government sources, it cannot be illegal for them to have received the same information from Zettl. Because the classified information was so readily available to the defense community generally, GTE could not have obtained an unfair competitive advantage by obtaining the information from Zettl.

As we have noted, following return of the indictment, the government notified the defendants that it planned to limit its proof on the espionage counts to seven program elements from the 1984 PEDs. The defense, pursuant to the requirements of CIPA, notified the government of its intention to introduce classified information into evidence as part of its defense.[10] 18 U.S.C. App. IV § 5. The

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[10] Section 5 of CIPA provides in part:

> (a) Notice by defendant.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such

district court then held a series of closed hearings to consider the use, relevance or admissibility of the classified information the defense sought to introduce.[11] 18 U.S.C. App. IV § 6(a). At these hearings, the United States

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proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

[11] Section 6 of CIPA provides in part:

(a) Motion for hearing.—Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.—(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than

objected to the introduction of all the classified information proffered by the defense except the 1984 Navy PEDs which the government announced it planned to introduce in their entirety. The 1984 Navy PEDs represent a substantial amount of classified information which the government planned to introduce at trial. It contains 1220 pages of information, approximately 300 of which are classified. Acting upon the assumption that such a large amount of classified information would be introduced by the government, the district court began considering the relevance of the hundreds of classified documents identified by the defense. For several days, the district court considered the relevance of defendants' identified classified documents, ruling some 192, or parts thereof, relevant at trial. The exact number may vary due to changes in classifications, withdrawal by defendants, duplications, etc.

Throughout the § 6(a) proceedings, the government took the position that it was improper for the court to consider at that time any applicable common law privileges that the government might wish to assert. Misconstruing this court's opinion in *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985), the United States argued that the court's only role at the § 6(a) hearing was to rule upon the relevancy of the classified information. Because of the government's failure to assert any privilege at the § 6(a) hearing, the district court viewed the defense evidence solely from a relevancy standpoint, and,

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by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a) of this section, the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

if relevant, held the evidence to be tentatively admissible.[12]

Following the district court's holdings that the classified information was admissible, the United States moved under § 6(c) of CIPA[13] that, in lieu of disclosure of the classified information, the court order the substitution of

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[12] The district court did recite in its final order that it considered the admissibility of the evidence in light of *Smith*. But, in that same order, it stated that its rulings made at the § 6(a) hearing had been tentative and subject to reconsideration in the light of *Smith* and the privileges which the government had not asserted. A fair reading of the record shows that the court's rulings at the § 6(a) hearing were tentative.

[13] Section 6(c) of CIPA provides:

> (c) Alternative procedure for disclosure of classified information.—(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—
>
> (A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or
>
> (B) the substitution for such classified information of a summary of the specific classified information.
>
> The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.
>
> (2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

a statement admitting relevant facts that the classified information would tend to prove. See 18 U.S.C. App. IV § 6(c)(1)(A). The government submitted three proposed substitutions to the court, and the defense submitted one. After hearings on these proposals, the district court rejected all of the government's proposals on the ground that they failed to admit facts that the defense evidence would tend to prove. The defense proposal would have stipulated the government out of court for most practical purposes. The government adhered to its position that the *Smith* balancing test should be applied at the 6(c) substitution hearings instead of at the 6(a) relevancy and admissibility hearing.

At the 6(c) substitution hearing, the district court also ruled upon the government's request for what the court called the silent witness rule to be used at trial for the handling of classified documents. Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury. The defense indicated that it probably would not object to handling the classified documents under the silent witness rule except for the 1984 Navy PEDs. The district court then said it would allow the case to proceed under such a rule as to all evidence except the 1984 PEDs. The court ordered that admission of that document would be in open court.[14]

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[14] The government construes the district court's direction to mean that it was ordering the United States to offer the document into evidence without qualification and in all events; we do not. We think

The centerpiece of this case is the book of 1984 Navy PEDs, and it is due almost wholly to that document and its treatment by the district court that the questions arising in this appeal have taken place.

From the outset of the case, the government has been ambivalent as to whether or not it would introduce the 1984 Navy PEDs into evidence. Its position as stated in its brief on appeal, and adhered to in oral argument, is as follows:

> The government should therefore possess the latitude to elect to introduce the 1984 Navy PEDs in its entirety, to introduce only the portion that relates to the seven program elements at issue, or to attempt to prove its case without introducing the document at all and risk suffering a directed verdict and acquittal if the remaining evidence proves to be insufficient. p. 42

The United States Attorney told the district court unequivocally that the government intended to introduce the 1984 Navy PEDs as an exhibit for the jury to consider. The district court, doubtless with this in mind, ruled that any information in the PEDs upon which the government intended to rely to convict the defendants would be subject to explanation, that is to say, the defendants would be entitled to show that they had come into possession of certain parts or all of the book with authority or with a need to know. It apparently was the position of the district court that, if the individual defendants were authorized to possess certain parts or all of the book in their line of duty for GTE, the reason they possessed the

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that, read in context, the direction of the district court was a thinly veiled warning that the government might suffer adverse consequences if the document were not offered into evidence. The government, not the court, is the final authority on whether it will offer a classified document into evidence. The court, not the government, then decides the consequences of any failure to offer such evidence.

same was a matter of fact, that is to say, whether they possessed the same to use in the ordinary performance of their duties, or whether they possessed the same for use to obtain an unfair competitive bidding advantage, which was the charge in count 1 of the indictment. A similar question of intent appears in counts 2 and 3 of the indictment in which Zettl and Edgington are charged with converting the 1984 Navy PEDs.

Faced with the government's ambivalence on what it intended to prove from that book, how much thereof it intended to introduce into evidence, and its refusal to be pinned down as to a theory of the case with respect to the classified documents and testimony, the district court was bound to assume, as it did, that the entire book would be offered into evidence. This was compounded by matching wariness on the part of the defense which, for example, from time to time asked the court to rule on the relevance of documents upon an ex parte explanation of the context in which they were to be offered.

Time and again during the CIPA proceedings, the government took the position that the district court should only consider relevancy in its hearings under § 6(a), 18 U.S.C. App. IV § 6(a). It took the position that any claim of more restricted admissibility than the ordinary rules of relevancy would indicate, see *Smith*, p. 1110, should not be made in the § 6(a) proceeding but should await proceedings under § 6(c) when the government would propose its substitution to be considered by the jury in lieu of the documents themselves, and this despite the fact that the district court indicated again and again that it thought the entire question of admissibility should be considered in the § 6(a) proceedings in accordance with *Smith*. The district court finally acquiesced in the government's position and explicitly stated in its order that it had indicated that its initial rulings on relevancy and admissibility were tentative based on its belief that the government would present or proffer evidence show-

ing that the public disclosure of a particular item of classified information would create an identifiable danger to the national security and require an evaluation of its previous rulings on relevance and admissibility in accordance with *Smith*. At that time, the order stated, the court was going to examine the issue of cumulativeness, see *Smith* p. 1110, as well as all other issues pertaining to a final determination of a document's admissibility at trial. But, it added that it never addressed these questions because the government did not present any evidence of such an identifiable danger. While the language of the court was that of the statute, it obviously was referring to the rule of *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953), in which the Court stated that a claim of privilege for a state secret be lodged by the head of the department which has control of the matter after personal consideration of that officer.

The government raises three principal issues on appeal. First, that the district court's rulings on relevancy were flawed by the failure of the defendants to file a proper notice under § 5(a) of CIPA; second, that the court should have considered the claim of privilege on account of state secrets and that of the informer, apparently by virtue of the mere classification of the documents, although there was no indication in the record that the head of the department concerned had made and considered such a claim; and, third, that the government's motion for substitution under § 6(c) should have been accepted by the district court.

The district court found the notice given by the defendants under § 5 to be sufficient. In that notice, they had listed several hundred documents which they intended to introduce and which they contend they would connect with the duties of the defendants in this case, not merely to GTE. The documents, the district court held, were all relevant to the defense of the case. The bulk of its rul-

ings were for the reasons that they explained the defendants' side of the government's theories of prosecution, or because they were the documents themselves which were contained in the PEDs, or because they contained the same information that was contained in the various papers making up the PEDs. While the government's principal claim on appeal derived from its § 5 objection is that the district court did not sift through each of the possibly thousands of items of classified information contained in the classified documents the defendants gave notice that they sought to introduce, nowhere in its brief or on oral argument does the government discuss any document in precise detail as an example of what it now calls this glaring deficiency. Even more importantly, the government does not so point out with particularity the parts of any of the documents which were irrelevant but merely complains that the district court was prone to admit irrelevant evidence. A reading of the transcript, however, reveals that there is little basis for the government's objection. While the § 5 notice was certainly broad enough, as the government acknowledges, in that it merely listed the documents the defendants proposed to introduce, as opposed to parts thereof, and could easily have been more precise, the district court patiently considered item by item each objection made by the government during the days of § 6(a) hearings. In view of the dozens or hundreds of rulings of the district court on relevancy, many of which, we may add, were favorable to the government, it does seem that one discrete example of error could have been provided in the government's brief on appeal. Such generalization will not do, as is apparent.[15] From the government's position in its brief

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[15] The tone of the government's brief is probably best explained by this passage from it:

> ". . . particularly when considered from the perspective of the standard of relevance applied in *Smith, it is beyond question that none of the specific classified information at issue is rele-*

as to the admission of irrelevant evidence, we think the truth is that there were no rulings of the district court as to relevancy worthy of appeal, and we so find.[16] The real point, while argued in the terms of relevancy of evidence, is that the defendants' § 5 notice was too imprecise. While that may be true, it was sufficiently broad for the government to have been given fair notice of what the defendants proposed to introduce at trial, and while it might have been couched in more precise terms in the sense of seeking to introduce a part of a document rather the document as a whole, any such error has been corrected by the detailed manner in which the district court conducted the § 6(a) hearings, taking into account on numerous occasions the government's objections to part of a document. So, if there were any error on that account, it is harmless.

The next point the government makes on appeal is that it has been deprived of its right to claim privilege under *Reynolds* and *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and like cases, including the *Smith* case in this circuit. The privilege which the government now seeks to assert is that of the kindred privileges of state secret and the informer. As we have

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vant to appellees' defense. As explained earlier, common to all of the appellees' proffered defenses, the purpose of seeking to introduce the classified information at issue is to demonstrate that the same information as that contained in the 1984 Navy PEDs and the other documents the defendants were charged with transmitting or receiving without authority was already available to cleared GTE employees and other potential government contractors with a need to know." p. 34 (Italics added)

[16] No great issue is made on appeal of the summaries of oral testimony approved by the district court. The rulings of the district court as to relevancy with respect to that matter are also affirmed.

We keep in mind that, while the summaries submitted were in general terms, the district court held that it would not permit any greater or more specific disclosure at trial than the summaries indicated.

mentioned before, despite the explicit holding in *Smith*, pp. 1109-1110, that the exercise of the privilege is not confined to the substitution procedure under § 6(c) as Smith had argued in that case, rather that it should be considered at the § 6(a) hearing, the government took the position in the district court that its claims of privilege should come only after the conclusion of the § 6(a) proceedings. In this position, the district court finally acquiesced. Thus, the government now wishes to claim its privilege of state secret and the informer which is quite contrary to the position it took in the district court. If this were an ordinary case, we would leave the government in the position in which it has maneuvered itself. But this is not the ordinary case; it is not the prosecution of some common criminal. The issues here are large and are those which should be addressed by the district court in the first instance. A claim of the government is that no one at GTE had the right to possession of the 1984 Navy PEDs book as a whole. The government admits, or apparently will do so, that some people at GTE were authorized to have in their possession each part of the 1984 Navy PEDs, but that no one at GTE was authorized to have in his possession the entire book. In this respect, the government will attempt to prove that Zettl, Carter and Edgington obtained the book by secretive, surreptious means and not through any regular channels. The government will further attempt to prove that possession of the book as a whole enabled GTE to have a competitive advantage in bidding on government contracts. The defendants, on the other hand, will attempt to prove that they were authorized to possess or had the need to know all the information in the book. Thus, so far as the conspiracy and conversion counts go, a question of fact will be left as to whether or not the possession of the book, which we take it will be tacitly admitted by the defendants, was for use in their ordinary duties at GTE, a perfectly proper purpose, or whether its

possession related to obtaining an unfair bidding advantage, or other equally improper purpose.

In this respect, we are now advised that the Navy has advised the Attorney General that it had rather forego this prosecution than have the entire 1984 Navy PEDs made public; yet, despite this, the government has made no offer to confine its proof to anything less than the entire book. In view of the seriousness with which the Navy views the release of the classified information in the 1984 PEDs, we think the government should have the chance to assert any privilege it may have which it generally describes in its brief as an assertion of state secrets and that of the informer, to include military secrets. For the reason that the national security is involved and that the government simply misconstrued our *Smith* decision, we remand this case to the district court to give the government an opportunity to assert its claim of privilege and to have the district court rule thereupon as it wanted to do from the outset.

On remand, the record has been made up as to the classified documents and classified testimony sought to be introduced by the defendants. That will give the government a studied opportunity to move for the excision of any "unnecessary" or otherwise legally superfluous part of any of the documents or testimony under § 8(b) of the statute. And, this should be done before a claim of privilege is asserted. Any classified information that the district court might excise from any of the documents or testimony could not have an effect on the claim of privilege except to make it more narrow. After the district court has ruled on the excision of the documents and testimony, the government will then be permitted to assert its claim of privilege under *Smith*. After the district court has ruled on the claim of privilege, as well as matters of whether the evidence is merely cumulative or corroborative, etc., see *Smith* p. 1110, then the government should file its motion for substitution under § 6(c) of the

statute if it be so advised, and the district court will then consider that motion.

We are of opinion the procedure we have just outlined is that contemplated by the statute, for, until the government knows exactly what classified information the district court proposes to admit, and after the district court has ruled on the claims of privilege and made its excision from documents and proffered testimony, it might be nearly impossible, and certainly is quite impractical, for the government to prepare properly a substitution motion.

Although the question is not now before us, by holding that the state secret and informer's privilege should be asserted in the § 6(a) hearings, we do not mean to imply that similar considerations should not be present in the court's consideration of substitution motions under § 6(c). That such is clearly the case is shown by § 6(c)(2) providing for the filing of an affidavit of the Attorney General in § 6(c) proceedings, which affidavit explains the basis for the classification of the information sought to be disclosed and that the disclosure would cause identifiable damage to the national security of the United States.[17]

In view of our decision as above set forth, it is unnecessary for us to pass up on the validity of the government's motion for substitution under § 6(c) of the statute.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

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[17] An affidavit of the Attorney General as well as declarations of the Secretary of the Navy and the Deputy Director of the National Security Agency were filed by the government in connection with a motion for the court to reconsider its § 6(c) substitution rulings. While we have had no occasion to consider the contents of those papers and they may or may not be sufficient to support the *Reynolds* rule above referred to, p. 15, and the § 6(c)(2) affidavit, the government may file any such additional papers if it be so advised.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5577

UNITED STATES OF AMERICA,
Appellant,

versus

BERNIE E. ZETTL,
Appellee.

ORDER

[Filed Jan. 16, 1990]

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Ervin and Judge Phillips.

/s/ H. E. Widener, Jr.
For the Court

CR-85-192-A

Dear Counsel:

Enclosed is a copy of an order filed January 16, 1990.

Yours truly,
JOHN M. GREACEN
Clerk

By: /s/ Donna Brown
DONNA BROWN
Deputy Clerk

Enclosure(s)

§ 641. Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.